No. 21-16929

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

FRANCISCO DUARTE,
Plaintiff-Appellant,

v.

CITY OF STOCKTON, ET AL.
Defendants-Appellees.

On Appeal from the United States District Court
for the Eastern District of California
No. 2:19-cv-00007-MCE-CKD
Hon. Morrison C. England, *District Judge*

APPELLANT'S OPENING BRIEF

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ORAL ARGUMENT REQUESTED

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page(s)

Cases

Statutes

Other Authorities

JURISDICTIONAL STATEMENT

Francisco Duarte filed this action pursuant to 42 U.S.C. § 1983 in the United States District Court for the Eastern District of California. The district court had jurisdiction over the suit under 28 U.S.C. §§ 1331 and 1343. The district court entered final judgment in favor of Defendants on October 22, 2021. Mr. Duarte timely filed a notice of appeal on November 13, 2021. *See* Fed. R. App. P. 4(a)(1)(A). This Court has jurisdiction to review the district court's final order under 28 U.S.C. § 1291.

ISSUES PRESENTED

Francisco Duarte was beaten by police officers, then charged with resisting arrest. He entered into an agreement with prosecutors: He would stay out of trouble for six months and complete ten hours of community service, and in exchange prosecutors would drop all charges against him. If Mr. Duarte didn't satisfy his end of the bargain, he'd plead guilty and serve three years' probation; he even signed the plea agreement up front.

Mr. Duarte upheld his end of the bargain, so at the end of the six months, the prosecution dropped all charges against him. The State court never accepted the plea agreement or entered any criminal judgment.

The district court nonetheless dismissed Mr. Duarte's false-arrest and excessive-force claims as barred by *Heck v. Humphrey*, 512 U.S. 477 (1994). That case held that the "hoary principle that civil tort actions are not appropriate vehicles for challenging the validity of outstanding criminal judgments applies to § 1983 damages actions that necessarily require the plaintiff to prove the unlawfulness of his conviction." *Id.* at 486. *Heck* thus bars a § 1983 claim where there is a "conviction or sentence," the criminal proceeding did not "terminate in favor of the accused," and success on the § 1983 claim would "necessarily imply the invalidity of" the conviction or sentence. *Id.* at 487.

I. The first issue on appeal is: Whether *Heck v. Humphrey*, 512 U.S. 477 (1994), bars Mr. Duarte's claims where:

A. Mr. Duarte entered into a "plea in abeyance"—his plea was not accepted, and judgment was not entered against him—such that there was no "conviction or sentence" in his criminal case;

B. Mr. Duarte's "plea in abeyance" ended with all charges being dismissed and any purported plea vacated, such that there was a "termination in favor of the accused";

C. Success on Mr. Duarte's claim for excessive force would not "necessarily imply the invalidity" of a conviction for resisting arrest; and

D. *Heck* is inapposite because Mr. Duarte's plea in abeyance was a no-contest plea, meaning that he did not admit guilt, and also because Mr. Duarte did not have access to federal habeas.

The district court also dismissed Mr. Duarte's claims against the City of Stockton and the Stockton Police Department, holding that neither was a "person" within the meaning of 42 U.S.C. § 1983.

II. The second issue on appeal is: Whether the district court erred in dismissing Mr. Duarte's claims against the City of Stockton and the Stockton Police Department, even though black-letter law holds that both are "persons" suable under 42 U.S.C. § 1983. *Monell v. Dep't of Soc. Servs.*, 436 U.S. 658, 662-63 (1978); *Karim-Panahi v. Los Angeles Police Dep't*, 839 F.2d 621, 624 n.2 (9th Cir 1988).

STATEMENT OF THE CASE

I. Factual Background

On Cinco de Mayo, 2017, Francisco Duarte ordered dinner at his favorite taco truck in Stockton, California. ER-30. He stood near the truck with his friends, enjoying his burrito. *Id.*, ER-33. While he was eating, he saw several police cars arrive at a Cinco de Mayo celebration nearby. *Id.* Although Mr. Duarte's friends wanted to get closer and see what was happening, Mr. Duarte decided "to leave because [he] had to work the next day." ER-31.

Mr. Duarte started walking to his car, but he did not make it there. On his way, he saw someone trip and fall just a few feet in front of him, pursued by Stockton police officers.[1] ER-39–40, ER-43. Three or four officers "all ganged up and got on top of" the fallen man; three or four others encircled the pile. ER-38.

From there, Mr. Duarte's version of events diverges from Defendants'. According to Mr. Duarte, the melee scared him, and he reflexively

[1] That someone turned out to be Alejandro Gutierrez, who was a co-plaintiff in the case below. ER-83. Mr. Gutierrez is not a party to this appeal. ER-109. Prior to the encounter in the parking lot, Mr. Duarte and Mr. Gutierrez did not know each other. ER-39.

"froze" and put his hands up. ER-40. Defendant Michael Gandy ran up to him, grabbed him by the shoulder, and threw him to the ground. ER-45. Mr. Duarte did not hear any warnings or orders from any police officers before Defendant Gandy tackled him. ER-43. Mr. Duarte attempted to break his fall but hit his face and nose on the parking lot. ER-46. Defendant Gandy climbed on top of a facedown Mr. Duarte, pressing his knees into Mr. Duarte's neck and back and pinning Mr. Duarte's arms beneath him. ER-45. Defendant Gandy yelled at Mr. Duarte to put his hands behind his back, but Mr. Duarte could not do so—his hands were trapped between his chest and the ground by Defendant Gandy's bodyweight. *Id.*

At that point, Defendant Kevin Hachler joined Defendant Gandy and began beating Mr. Duarte with a hard wood baton. *Id.* Body camera footage shows Mr. Duarte screaming with each blow. *Id.* Defendant Hachler hit Mr. Duarte at least six times on the same spot on his leg. ER-45–46. Asked to gauge how hard Defendant Hachler struck him, Mr. Duarte testified, "From one to ten, I'd say about a ten." ER-46.

The baton strikes broke Mr. Duarte's leg. ER-55. But Defendants still forced Mr. Duarte to walk 20 feet, on his broken leg, to a police car. ER-58. That walk exacerbated the injury to Mr. Duarte's leg. *Id.*

When officers wrote up the incident, they chronicled a very different version of events. According to Defendant Gandy's report, Officer Moya (not a defendant in this suit) had ordered Mr. Duarte to "disperse and leave the area," but Mr. Duarte instead "waked [sic] around the car and was interfering with [Defendant Gandy] as [he] was assisting officers talking [sic] another subject into custody." ER-54. Defendants Gandy and Hachler also claimed that Mr. Duarte pushed Defendant Gandy before Defendant Gandy tackled Mr. Duarte. ER-48; ER-54. And both Defendants claimed that Mr. Duarte's hands were not pinned under his body when he was on the ground; instead, they wrote, he was using his hands to "attempt[] to get away." ER-48.

II. Procedural Background

Based on the police reports drafted by Defendants Gandy and Hachler, prosecutors charged Mr. Duarte in State court with a misdemeanor violation of California Penal Code § 148(a)(1), which prohibits, in relevant part, "willfully resist[ing], delay[ing], or obstruct[ing] any public officer . . . in the discharge or attempt to discharge any duty of his or her office or employment." Cal. Penal Code § 148(a)(1); ER-8.

Mr. Duarte eventually reached an agreement with prosecutors. He signed a form indicating he would withdraw his original plea of not guilty and instead enter a plea of no contest to the criminal charge—that is, he would not admit guilt, but he would not fight the prosecutors' case. ER-75–76. But Mr. Duarte and the prosecution agreed that the court would not accept that plea form right away. ER-78. Instead, the court's acceptance of the plea was "held in abeyance" for six months. *Id.* If, during that time, Mr. Duarte stayed out of trouble and completed ten hours of community service at the non-profit of his choice, the prosecution agreed to "vacate [the] plea and dismiss" all charges. ER-75. If not, the parties would ask the court to accept Mr. Duarte's plea, enter a judgment of conviction, and sentence him to three years' informal probation. *Id.*

Mr. Duarte upheld his end of the bargain, staying out of trouble and completing ten hours of community service. ER-80. In January 2019, the prosecution upheld its end, dismissing the case against Mr. Duarte in the "interest of justice." *Id.* Neither the hearing where Mr. Duarte agreed to the "plea in abeyance" nor the hearing where charges were dismissed was transcribed. ER-72.

III. Proceedings Below

Mr. Duarte filed suit under 42 U.S.C. § 1983 against Defendant Gandy, Defendant Hachler, two other Stockton police officers, the City of Stockton, the Stockton Police Department, Stockton Chief of Police Eric Jones, and various John Doe defendants. ER-93–99. As relevant here, he brought Fourth Amendment claims for excessive force and for false arrest against all Defendants.[2] ER-93–97.

The district court ultimately disposed of all Mr. Duarte's claims in Defendants' favor. At the motion-to-dismiss stage, the district court dismissed all claims against the City of Stockton and the Stockton Police Department and dismissed the false-arrest claims against the remaining Defendants. ER-64–68. At the summary-judgment stage, the district court granted summary judgment to the remaining Defendants on the excessive-force claim. ER-11–17.

In dismissing all claims against the City of Stockton and the Stockton Police Department, the district court acknowledged Supreme Court and published Ninth Circuit precedent making clear both could be sued

[2] Mr. Duarte also raised a substantive due process claim under the Fourteenth Amendment, the dismissal of which he does not appeal. ER-99.

under § 1983, but nonetheless dismissed those Defendants, relying on a concurring opinion in a case about a different statute. ER-67–68 (discussing *United States v. Kama*, 394 F.3d 1236, 1240 (9th Cir. 2005) (Ferguson, J., concurring)).

In dismissing the false-arrest claims against the remaining Defendants, the district court correctly noted that "a plaintiff cannot maintain a lawsuit seeking damages under 42 U.S.C. § 1983 if success in that lawsuit would 'necessarily imply' the invalidity of a related prior conviction . . . unless there has been a 'termination of the prior criminal proceeding . . . in favor of the accused.'" ER-65 (quoting *Heck*, 512 U.S. at 484, 486-87). But although the district court acknowledged that Mr. Duarte "was never formally convicted"—that, in other words, there was no "prior conviction" whose invalidity the instant suit might imply—it nonetheless found that Defendants had proven the elements necessary to bar Mr. Duarte's false-arrest claims under *Heck*. ER-66–67.

The district court subsequently granted summary judgment to Defendants on Mr. Duarte's excessive-force claims. In so doing, the district court acknowledged this Court's precedents explaining that where, as here, a case involves an underlying charge of resisting a police officer

under California Penal Code § 148(a)(1) and an excessive-force claim, *Heck* doesn't necessarily bar the excessive-force claim. ER-13–17 (discussing *Hooper v. Cty. of San Diego*, 629 F.3d 1127 (9th Cir. 2011)). That's because success on the excessive-force claim often won't "necessarily imply the invalidity" of the conviction. *Id.* But the district court found that, in this case, Mr. Duarte's excessive-force claim "necessarily impl[ied]" the invalidity of a conviction and so was barred by *Heck*. *Id.*

Mr. Duarte timely appealed. ER-109.

SUMMARY OF THE ARGUMENT

I. *Heck v. Humphrey*, 512 U.S. 477 (1994), does not foreclose Mr. Duarte's claims. *Heck* bars a § 1983 claim only where "a judgment in favor of the plaintiff would necessarily imply the invalidity of his conviction or sentence" and the criminal proceedings did not "terminate in favor of the accused." *Id.* at 487, 489. For the *Heck* bar to apply, then, there must be a "conviction or sentence," there can be no "favorable termination" to the criminal proceedings, and success on the § 1983 claim must "necessarily imply the invalidity" of that conviction or sentence. *Id.* None of those requirements to impose the *Heck* bar obtain here.

A. First, *Heck* bars a claim only where there is a "conviction or sentence." There is no such conviction or sentence here: The State trial court never accepted Mr. Duarte's plea, charges against Mr. Duarte were dismissed, and no judgment was ever entered against Mr. Duarte. ER-70–80.

B. Second, *Heck* does not bar a claim where proceedings have "terminated in favor of the accused." Charges against Mr. Duarte were dismissed, and any plea was vacated. Either would qualify as a "favorable termination," meaning *Heck* does not apply. *See Thompson v. Clark,* No. 20-659, 2022 WL 994329, slip op. at 2-3 (U.S. Apr. 4, 2022); *Roberts v. City of Fairbanks*, 947 F.3d 1191, 1196 (9th Cir. 2020).

C. Third, *Heck* does not apply where success on a § 1983 claim would not "necessarily imply the invalidity" of any conviction or sentence. But success on Mr. Duarte's excessive-force claim could co-exist with a valid conviction for resisting arrest (if there were such a conviction), because a jury could find that officers used excessive force at a separate moment from any time that Mr. Duarte was putatively resisting arrest. *See Smith v. City of Hemet*, 394 F.3d 689, 693-94 (9th Cir. 2004) (en banc).

D. Even if Defendants had established the elements of the *Heck* affirmative defense, this Court should not apply *Heck* to bar Mr. Duarte's claims here because two features of Mr. Duarte's criminal proceedings render *Heck* inapposite. First, Mr. Duarte's plea in abeyance was a "no-contest" plea, meaning that he didn't stipulate to any facts that would conflict with the basis for his § 1983 suit. Second, Mr. Duarte never had access to federal habeas, which this Court has made clear undermines the rationale for applying the *Heck* bar. *See Nonnette v. Small*, 316 F.3d 872, 876-78 (9th Cir. 2002).

II. The district court also erred in dismissing Mr. Duarte's claims against the City of Stockton and the Stockton Police Department. It is black-letter law that both are "persons" under 42 U.S.C. § 1983. *Monell v. Dep't of Soc. Servs.*, 436 U.S. 658, 662-63 (1978); *Karim-Panahi v. L.A. Police Dep't*, 839 F.2d 621, 624 n.2 (9th Cir 1988).

STANDARD OF REVIEW

Review of the issues in this case—whether *Heck* bars Mr. Duarte's claims and whether an entity is a "person" under 42 U.S.C. § 1983—is de novo. *Roberts v. City of Fairbanks*, 947 F.3d 1191, 1196 (9th Cir. 2020); *Karim-Panahi v. Los Angeles Police Dep't*, 839 F.2d 621, 623 (9th Cir.

1988). This Court must accept Mr. Duarte's factual allegations in his complaint as true and draw all inferences in his favor when reviewing the dismissal of his false-arrest claims and claims against the City of Stockton and the Stockton Police Department, decided at the motion-to-dismiss stage. *Roberts*, 947 F.3d at 1196. And this Court must view the evidence in the light most favorable to Mr. Duarte when reviewing the dismissal of Mr. Duarte's excessive-force claim against the remaining Defendants, decided at summary judgment. *Hooper v. Cty. of San Diego*, 629 F.3d 1127, 1129-30 (9th Cir. 2011).

ARGUMENT

I. *Heck v. Humphrey* Does Not Bar Mr. Duarte's Claims.

In *Heck v. Humphrey*, the Supreme Court considered a 42 U.S.C. § 1983 lawsuit challenging the way police and prosecutors secured the plaintiff's criminal conviction. 512 U.S. at 478-79. Citing the need to prevent conflicting civil and criminal judgments and to channel claims more appropriately brought in habeas corpus through the federal habeas statutes, the Supreme Court imposed the following rule: A § 1983 claim will be barred if success on that claim would "necessarily imply the invalidity

of a conviction or sentence" and the criminal proceedings did not "terminate in favor of the accused." *Id.* at 487.

Heck does not have any bearing on Mr. Duarte's case for at least four reasons, any one of which would be sufficient to reverse the district court. First, *Heck* bars a claim only where there is a "conviction or sentence"; here, Mr. Duarte was never convicted or sentenced. §I.A. Second, *Heck* only bars a claim where there has been no "favorable termination"; here, both the dismissal of charges against Mr. Duarte and the vacatur of his plea qualify as "favorable terminations." §I.B. Third, *Heck* only bars a claim where success on that claim would "necessarily imply the invalidity" of any conviction or sentence; here, success on Mr. Duarte's excessive-force claim would not imply the invalidity of a conviction for resisting a police officer, even if there were such a conviction. §I.C. And finally, even if the requirements to impose the *Heck* bar are met, *Heck* should not apply to Mr. Duarte's case because of two features of his criminal proceeding: The plea held in abeyance was a no-contest plea, rather than a guilty plea, and Mr. Duarte never had recourse to federal habeas. §I.D.

A. Mr. Duarte Has No "Conviction Or Sentence."

Heck, by its plain terms, bars only those § 1983 claims where "a judgment in favor of the plaintiff would necessarily imply the invalidity of his conviction or sentence." 512 U.S. at 487. It thus "is called into play only when there exists 'a conviction or sentence,' … that is to say, an 'outstanding criminal judgment.'" *Wallace v. Kato*, 549 U.S. 384, 393 (2007). And because *Heck* is an affirmative defense, it's Defendants' burden to show that there is such a conviction or sentence. *Washington v. Los Angeles Cty. Sheriff's Dep't*, 833 F.3d 1048, 1056 (9th Cir. 2016).

1. There was no "conviction" against Mr. Duarte. Mr. Duarte entered into an agreement with the prosecution: If he made amends and stayed out of trouble for six months, the prosecution would dismiss the charges; if not, he would plead guilty. ER-75–76. As part of that agreement, Mr. Duarte signed a plea form. *Id.* But no court ever *accepted* his plea. The State court's "acceptance of plea" was "held in abeyance." ER-77. Until or unless a court accepted the plea agreement, there was simply no judicial action that could create a "conviction." *See Mitchell v. Kirchmeier*, 28 F.4th 888, 895 (8th Cir. 2022) (describing analogous agreement as "simply a contract"). That never happened.

Instead, Mr. Duarte's case was ultimately "dismissed" in January 2019. ER-80; *see also* ER-75. Were there any doubt about whether he was "convicted or sentenced," that dismissal should end it. A "conviction or sentence" isn't "dismissed"; no lawyer would call what happens after a defendant finishes serving a sentence a "dismissal." *See Martin v. City of Boise*, 920 F.3d 584, 613 (9th Cir. 2019) (no "conviction or sentence" where charges were dismissed); *People v. Castaneda*, 44 Cal. Rptr. 2d 666, 668 n.1 (Ct. App. 1995) (no conviction where charges dismissed).

Indeed, even if the State court had accepted the plea, and even if charges against Mr. Duarte had not been dismissed, there *still* would have been no conviction, because there was no criminal judgment against Mr. Duarte. *Heck*'s animating purpose was to avoid conflicting judgments: It read § 1983 against the backdrop of "the hoary principle that civil tort actions are not appropriate vehicles for challenging the validity of outstanding criminal *judgments*," and it specifically explained that "if the district court determines that the plaintiff's action, even if successful, will not demonstrate the invalidity of any outstanding criminal *judgment* against the plaintiff, the action should be allowed to proceed." 512 U.S. at 486-87 (emphasis added). And under California law, a "conviction"

doesn't exist for purposes of a civil proceeding until there's a judgment entered. *See Boyll v. State Pers. Bd.*, 146 Cal. App. 3d 1070, 1076 (Ct. App. 1983).

Here, everyone agrees—including the district court—that the State court did not issue a criminal judgment against Mr. Duarte. Mr. Duarte's case was dismissed "upon motion of DDA, interest of justice," ER-80, an apparent reference to California Penal Code § 1385(a), which allows dismissal of an action "upon the application of the prosecuting attorney, and in furtherance of justice." *See also People v. Hatch*, 991 P.2d 165, 269 (Cal. 2000) ("Section 1385 permits dismissals in the interest of justice." (citation omitted)). That statutory section "does not authorize a dismissal [of an action] after… rendition of judgment." *People v. Kim*, 151 Cal. Rptr. 3d 154, 159 (Ct. App. 2012); *see People v. Barraza*, 35 Cal. Rptr. 2d 377, 382 n.8 (Ct. App. 1994). Accordingly, the minute orders in Mr. Duarte's case don't reflect that one was issued (and Defendants haven't produced one). ER-78, ER-80.

Mr. Duarte's plea was held in abeyance, charges against him were dismissed, and no criminal judgment against him was ever entered. There was no criminal "conviction."

2. Nor was a "sentence" imposed on Mr. Duarte. For starters, a sentence can't exist without a conviction; a sentence is the punishment *for* a conviction, so if Mr. Duarte was never convicted of anything, he can't have had a sentence imposed, either. *See Blazak v. Ricketts*, 971 F.2d 1408, 1413 (9th Cir. 1992) ("There can be no sentence without a conviction."); *Mitchell*, 28 F.4th 888 at 895 ("Here, [plaintiff] was never convicted of—and therefore, *a fortiori*, never sentenced on—the charges against him."). Moreover, the case against Mr. Duarte was dismissed under California Penal Code § 1385(a), which "has never been held to authorize a dismissal of an action after the imposition of a sentence." *Kim*, 151 Cal. Rptr. at 159. Had Mr. Duarte served a sentence, dismissal under § 1385(a) would have been "not only improper but also void." *Id.* Defendants thus can't show that Mr. Duarte's ten hours of community service was a "sentence."

3. Four other circuits to consider the question have found that analogous contracts between prosecutors and defendants do not constitute "convictions or sentences."[3] *See Mitchell*, 28 F.4th at 895; *Vasquez Arroyo*

[3] The Second Circuit has also found that the *Heck* bar is not triggered by such contracts because those contracts constitute a "favorable termination." *See infra*, §I.B.

v. Starks, 589 F.3d 1091, 1095 (10th Cir. 2009); *McClish v. Nugent*, 483 F.3d 1231, 1251 (11th Cir. 2007); *S.E. v. Grant Cty. Bd. of Educ.*, 544 F.3d 633, 637 (6th Cir. 2008). Though those agreements go by a variety of monikers, they share the same basic structure as Mr. Duarte's plea in abeyance. As in this case, a criminal defendant entered into an agreement with prosecutors to forego prosecution for a specified period of time. *Mitchell*, 28 F.4th at 895; *Vasquez Arroyo*, 589 F.3d at 1094-95; *S.E.*, 544 F.3d at 635-36; *McClish*, 483 F.3d at 1236. As in this case, the defendant agreed not to commit further crimes for that period of time; in some cases, the defendant agreed to additional conditions. *Mitchell*, 28 F.4th at 895; *Vasquez Arroyo*, 589 F.3d at 1094-95 ("supervised performance program"); *S.E.*, 544 F.3d at 635-36 (complete diversion program); *McClish*, 483 F.3d at 1236 (same). And as in this case, the prosecution dismissed all charges after the conditions were satisfied and the specified period of time lapsed. *Id.*

Each of the Sixth, Eighth, Tenth, and Eleventh circuits has concluded that agreements with that structure are not "convictions or sentences" for purposes of *Heck*. As one circuit put the point, these agreements are "the opposite of a conviction"—they postpone the prosecution

and ultimately result in the prosecutor dismissing all charges. *Vasquez Arroyo*, 589 F.3d at 1095.

As another circuit explained, to find that these sorts of agreements trigger the requirements of *Heck* would be to conclude that "the mere existence of a criminal *charge* incompatible with the plaintiff's § 1983 claim triggers" the *Heck* bar, a rule that the Supreme Court has explicitly rejected. *Mitchell*, 28 F.4th at 896 (discussing *Wallace*, 549 U.S. at 393). *Heck*'s raison d'etre is to avoid a clash between the civil judgment in a § 1983 suit and some preexisting criminal judgment. 512 U.S. at 485-87. Where charges against a plaintiff have been dismissed, there is no possibility of such a conflicting criminal judgment. As a third sister circuit put the point, "to dismiss this § 1983 claim as barred by *Heck* because of a potential conflict that we know now with certainty will never materialize would stretch *Heck* beyond the limits of its reasoning." *McClish*, 483 F.3d at 1251-52.

4. The district court did not contest any of this. Indeed, the district court acknowledged that Mr. Duarte "was never formally convicted." ER-66. It sided with Defendants because it found that "there had been no favorable termination of the underlying criminal proceedings," citing

Gilles v. Davis, a Third Circuit case. ER-66 (discussing 427 F.3d 197, 210 (3d Cir. 2005)). As explained *infra*, §I.B, that conclusion was wrong. More fundamentally, as the Eleventh Circuit has explained, the Third Circuit in *Gilles* erred by skipping over the first of *Heck*'s requirements: That there be a "conviction or sentence" in the first place. *See McClish*, 483 F.3d at 1251 (rejecting *Gilles*'s reasoning because it ignored that "antecedent" question). If Mr. Duarte was never convicted—and the district court acknowledged he had not been, ER-66—*Heck* does not apply. To the extent there was ever any doubt on that score, the Supreme Court's opinion in *Wallace v. Kato*, 549 U.S. 384 (2007)—decided two years after *Gilles*—dispelled it: *Heck* "is called into play only where there exists a conviction or sentence." *Wallace*, 549 U.S. at 393.[4]

[4] In addition, the agreement at issue in *Gilles* was a creature of Pennsylvania's rules of criminal procedure, which specifically provided that such agreements "may be statutorily construed as a conviction" in some circumstances. *Gilles*, 427 F.3d at 209 (quoting Pa. R. Crim. P. 312 (Cmt.)). The sort of agreement Mr. Duarte entered into, by contrast, is nowhere mentioned in California's statutes or rules of criminal procedure, let alone described as a "conviction." Indeed, the closest thing in California's statutory scheme to the agreement Mr. Duarte entered into is a misdemeanor diversion, defined as "the procedure of postponing prosecution of an offense filed as a misdemeanor." Cal. Penal Code § 1001.1. In contrast to Pennsylvania law, which allowed the agreement in *Gilles* to be treated as a conviction, California law makes clear that, upon completion of a

B. The Dismissal Of All Charges Against Mr. Duarte And The Vacatur Of His Plea Were "Favorable Terminations."

Even if Mr. Duarte's contract with the prosecutor amounted to a "conviction or sentence," *Heck* still would not apply if criminal proceedings terminated "in favor of the accused." *See* 512 U.S. at 487. Mr. Duarte's plea in abeyance specifically noted that all charges would be dismissed and the plea vacated after six months, and in January 2019, that's exactly what happened. ER-75; ER-80. Either of those dispositions—dismissal of charges or vacatur of the plea—is a "favorable termination" under *Heck*.

1. Just last week, the Supreme Court held that dismissal of all charges against a criminal defendant constituted a "favorable termination" for purposes of a subsequent malicious-prosecution suit. *Thompson v. Clark*, No. 20-659, 2022 WL 994329 (U.S. Apr. 4, 2022). Although a "favorable termination" for purposes of a malicious prosecution suit is not the same as a "favorable termination" for purposes of assessing the *Heck* bar in other kinds of suits, this Court has explained that, if anything,

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misdemeanor diversion agreement, even "the arrest upon which the diversion was based shall be deemed to have never occurred." *Id.* § 1001.9(a).

fewer dispositions are "favorable terminations" for malicious prosecution purposes than under *Heck*. *Roberts*, 947 F.3d at 1202.

In *Thompson*, the Supreme Court held that the dismissal of all charges against the plaintiff "in the interests of justice" was a "favorable termination" for a malicious-prosecution suit. *Thompson*, No. 20-659, slip op. at 11-12; Joint App'x 158, *Thompson*, No. 20-659 (U.S. June 4, 2021). The Supreme Court concluded that, in 1871, when § 1983 was passed, a "favorable termination" for malicious prosecution meant only that "the particular prosecution be disposed of in such a manner that this cannot be revived, and the prosecutor, if he wishes to proceed further, will be put to a new one." *Thompson*, No. 20-659, slip op. at 8-9. Respondent in *Thompson* protested that the plaintiff in that case may well have been guilty of the charges—the prosecutor's dismissal order didn't say otherwise—but the Supreme Court held that the reason for the dismissal was irrelevant. *Id.* at 9-11.

In this case, just as in *Thompson*, charges against Mr. Duarte were dismissed in the interests of justice. ER-80. Just as in *Thompson*, the prosecution was "disposed of." *See Thompson*, No. 20-659, slip op. at 9. And just as in *Thompson*, the *reason* that charges against Mr. Duarte

were dismissed does not matter. *See id.* The Supreme Court's conclusion in *Thompson* that dismissal of charges is a favorable termination even under the more-stringent malicious-prosecution standard *a fortiori* means that the dismissal of charges in this case is a "favorable termination" under *Heck*'s less-stringent standard.

2. There's a second, independent reason that the conclusion of Mr. Duarte's case was a "favorable termination": Mr. Duarte's plea was vacated in January 2019. ER-75.

This Court has explained that *any* vacatur constitutes a "favorable termination" for *Heck* purposes. In *Roberts v. City of Fairbanks*, 947 F.3d 1191 (9th Cir. 2020), this Court considered a case where a State court vacated plaintiff's conviction and dismissed the indictment against him pursuant to a settlement agreement. *Id.* at 1195. The conviction wasn't vacated because the State court held plaintiff innocent; indeed, the parties even stipulated that the original conviction was "validly entered based on proof beyond a reasonable doubt." *Id.*

But that did not affect this Court's analysis. *Heck* does not apply where there has been a vacatur, this Court explained, no matter the reason for the vacatur. This Court relied on the following syllogism: *Heck*

said that a conviction "declared invalid by a state tribunal authorized to make such a determination" is a "favorable termination"; the dictionary definition of "vacate" is "to invalidate"; and so a State court's vacatur of the plaintiff's conviction, on whatever basis, is a "favorable termination," meaning *Heck* does not apply. *Id.* at 1198 (quoting *Black's Law Dictionary* 1782 (10th ed. 2014)). This Court specifically rejected the argument that it needed to look at anything beyond the fact of the vacatur, concluding that such an argument "contravenes the plain language of *Heck*." *Id.* at 1201-02.

In this case, as anticipated in the plea agreement itself, the charges were "vacate[d] and dismiss[ed]" in January 2019 upon the expiration of the abeyance period. ER-75. As in *Roberts*, the fact that a State court vacated Mr. Duarte's plea and dismissed all charges against him—regardless of the reason it did so—means that proceedings were "favorably terminated," and *Heck* does not apply.[5]

[5] Indeed, Mr. Duarte's case was favorably terminated even under the more-stringent common-law standard that inspired *Heck*. As this Court has explained, at common law, "a 'favorable' final order or disposition must preclude the bringing of further proceedings against the accused." *Roberts*, 947 F.3d at 1202 (quoting Restatement (Second) of Torts § 659 cmt. g); *see also* W. Page Keeton, et al., *Prosser & Keeton on Torts* § 119,

3. The district court found otherwise relying *Gilles v. Davis*, 427 F.3d 197, 210 (3d Cir. 2005). *Gilles*, in turn, relied on the policy concern that holding a pretrial diversion to be a favorable termination would discourage prosecutors from pursuing diversion programs. *Id.* at 210-11. But such policy concerns, even if founded, would have no place in this Court's analysis; *Heck* is based on the "hoary principle[s]" of common law that formed the backdrop against which § 1983 was passed, not on free-wheeling judgments about how to incentivize prosecutors. *See* 512 U.S. at 486.

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at 874 (5th ed. 1984). *Heck* rejected that standard as unduly narrow; for instance, a conviction that is "called into question by a federal court's issuance of a writ of habeas corpus" is "favorably terminated" under *Heck*, even though "further proceedings" may be (and often are) "brought against the accused." *Id.*; *Roberts*, 947 F.3d at 1201-02 (discussing *Heck*, 512 U.S. at 487). But even under that narrower standard, Mr. Duarte's case terminated favorably. His misdemeanor case was dismissed under California Penal Code § 1385, *supra*, 17, and such a dismissal bars any future prosecution for the same offense. Cal. Penal Code § 1387(a) ("An order terminating an action pursuant to this chapter . . . is a bar to any other prosecution for the same offense . . . if it is a misdemeanor not charged together with a felony."); *Burris v. Super. Ct.*, 103 P.3d 276, 280 (Cal. 2005) ("Misdemeanor prosecutions are subject to a one-dismissal rule; one previous dismissal of a charge for the same offense will bar a new misdemeanor charge.").

Gilles also leaned heavily on decisions from the Second Circuit. *Gilles*, 427 F.3d at 210-11 (discussing *Roesch v. Otarola*, 980 F.2d 850 (2d Cir. 1992), and *Singleton v. New York*, 632 F.2d 185, 193-95 (2d Cir. 1980)).[6] But that circuit has since retreated from the holdings *Gilles* relied upon.

In *Smalls v. Collins*, 10 F.4th 117 (2d Cir. 2021), the Second Circuit considered a disposition analogous to Mr. Duarte's. The *Smalls* plaintiff's criminal charges were resolved by an "adjournment in contemplation of dismissal" or "ACD," a New York procedure that, like the plea in abeyance in this case, puts a prosecution on hold "with a view to ultimate dismissal of the accusatory instrument in furtherance of justice." *Id.* at 129 & n.6. The Second Circuit explained that prior case law holding that similar dispositions were not "terminations in favor of the accused" applied only to claims that challenged "the validity of the initiation of the

[6] *Gilles* also relied on cases from the Fifth Circuit, but those also, like *Gilles*, skip over the question whether there was a "conviction or sentence" in the first place," *see supra*, 21; *Taylor v. Gregg*, 36 F.3d 453, 456 (5th Cir. 1994); *Morris v. Mekdessie*, 768 F. App'x 299, 301-02 (5th Cir. 2019), or leave open whether successful completion of an agreement like Mr. Duarte's is still a conviction, *see DeLeon v. City of Corpus Christi*, 488 F.3d 649, 655-56 (5th Cir. 2007).

prosecution," where a higher standard for a "favorable termination" applied. *Id.* at 138, 142-43. For any claim that is *not* about the validity of initiating a prosecution—the fabricated-evidence claim in *Smalls* or the claims in this case, all of which predate the prosecution—an ACD constitutes a "termination in favor of the accused" within the meaning of *Heck*.

That result, the Second Circuit explained, was consistent with the purposes of *Heck*. "[T]here is no risk of parallel litigation because the charges have been dismissed." *Id.* at 142. And "once the charges against [plaintiff] were dismissed, any concerns about the possibility of 'two-track litigation' similarly dissipated." *Id.* "Nor is there any risk of conflicting judgments," the Second Circuit explained, because "no judgment was entered." *Id.* And the Second Circuit specifically rejected concerns that adopting its rule "would disincentivize prosecutors from offering ACDs in order to foreclose section 1983 lawsuits": "[I]t is not the job of prosecutors to insulate the City of New York from liability. Their obligation is to seek justice . . . We will not presume that prosecutors will violate these ethical and professional obligations simply to assist the City in avoiding civil liability." *Id.* at 144.

Because there was a "favorable termination" of criminal proceedings against Mr. Duarte, *Heck* cannot bar his §1983 claim.

C. Success On Mr. Duarte's Excessive-Force Claim Would Not "Necessarily Imply" The Invalidity Of Any Conviction.

Even assuming that there was a "conviction or sentence" against Mr. Duarte, *but see supra*, §I.A; and that the vacatur of the plea and dismissal of all charges was not a "favorable termination," *but see supra*, §I.B; at least one of Mr. Duarte's claims—for excessive force—cannot be barred. That's because *Heck* bars a §1983 claim only when success on that claim would "necessarily imply the invalidity of his conviction or sentence." *Heck*, 512 U.S. at 487. The Supreme Court in *Heck* "was careful to stress the importance of the term 'necessarily.'" *Nelson v. Campbell*, 541 U.S. 637, 646-47 (2004). If liability in a § 1983 suit could be based on *any* version of events that allows for a still-valid conviction, *Heck*'s requirements do not apply. And it is Defendants' burden to show that plaintiff's success on a §1983 claim would necessarily imply the invalidity of a criminal conviction. *Washington v. Los Angeles Cty. Sheriff's Dep't*, 833 F.3d 1048, 1056 n.5 (9th Cir. 2016).

In this case, many—perhaps most—of the versions of events under which a jury could find excessive force still allow for the possibility that

Mr. Duarte could have been validly convicted under California Penal Code § 148(a)(1) by "willfully resist[ing], delay[ing], or obstruct[ing] any public officer…in the discharge or the attempt to discharge any duty of his or her office or employment."

1. This Court has repeatedly held that a § 148(a)(1) conviction can coexist with a finding that police used excessive force. After all, "[h]ow you act and how police respond are two different issues." *Kon v. City of Los Angeles*, 263 Cal. Rptr. 3d 393, 396 (Ct. App. 2020).

So, for example, this Court considered the case of a plaintiff who was told she was under arrest, jerked her hand away, was taken to the ground, struggled with officers, and then was bitten by a police dog. *Hooper v. Cty. of San Diego*, 629 F.3d 1127, 1129 (9th Cir. 2011). This Court found that success on an excessive-force claim would not necessarily imply the invalidity of plaintiff's conviction under § 148(a)(1). *Id.* at 1134. The key, this Court explained, was that the two were "based on different actions," even though those different actions took place "during one continuous transaction" that occurred over a mere 45 seconds. *Id.* at 1129, 1134. The § 148(a)(1) conviction could have been based on plaintiff jerking her hand away or struggling on the ground; the excessive-force

claim, on the other hand, could have been based on the dog bite, which occurred at a different point in time. *Id.* at 1132-34.

So, too, in a case where a plaintiff refused to comply with instructions to put his hands on his head, then was pepper-sprayed, then attempted to reenter his home (contrary to police orders), and then was bitten by a police dog: The § 148(a)(1) conviction could have been based on the plaintiff's initial failure to put his hands on the head and the excessive-force claim on the subsequent pepper-spraying and biting. *Smith v. City of Hemet*, 394 F.3d 689, 693-94 (9th Cir. 2004) (en banc). Same in a case where a plaintiff hit a police officer while attempting to stop the arrest of her boyfriend and his son, then was hit in the face by the officer: The § 148(a)(1) conviction could be based on the plaintiff hitting the officer, and the excessive-force claim on the officer hitting the plaintiff. *Sanford v. Motts*, 258 F.3d 1117, 1120 (9th Cir. 2001).

2. In this case, success on Mr. Duarte's § 1983 excessive-force claim would not "necessarily imply" the invalidity of a conviction under § 148(a)(1) (assuming there were such a conviction). "It was the burden of the defendants to establish their defense by showing what the basis

[for the conviction] was." *Sanford*, 258 F.3d at 1119. In this case, Defendants have not and could not do so: Mr. Duarte and the prosecution filled out a no-contest plea form that left entirely blank the factual basis for the plea. ER-75. Because "nothing in the record informs us what the factual basis was" for any purported conviction, Defendants must show that *no* possible factual basis for a § 148(a)(1) could coexist with Mr. Duarte's excessive-force claim. *See Sanford*, 258 F.3d at 1119. Mr. Duarte's claim is not barred by *Heck* if there is any version of events that would allow for both a §148(a)(1) conviction and an excessive-force claim.

There are at least three such versions here.[7] Recall Defendants' own version of events: Officers claim that Mr. Duarte disobeyed Officer Moya's command to disperse; that he pushed Defendant Gandy when Defendant Gandy asked him to back up; and that when Defendant Gandy subsequently tackled him to the ground, he refused to produce his hands

[7] Note that a jury is not obligated to find one of these sequences of events to side with Mr. Duarte. That is, if this Court concludes that success on Mr. Duarte's excessive-force claim would not "necessarily imply" the invalidity of any conviction or sentence, Mr. Duarte is "still entitled to tell the jury the entire story" and is not bound to one of these versions of events. *See Wilkerson v. Wheeler*, 772 F.3d 834, 840-41 (9th Cir. 2014) ("*Heck* is not an evidentiary bar, but a claims bar."); *Simpson v. Thomas*, 528 F.3d 685, 691-95 (9th Cir. 2008).

for cuffing, so Defendant Hachler broke his leg with a baton and forced him to walk on his broken leg to the police car. ER-58.

Thus, Mr. Duarte's § 148(a)(1) "conviction" could be based on at least three different sets of actions. First, the "conviction" could be based on disobeying Officer Moya's command to disperse (though body-camera footage documents no such command). *See* ER-54. But a jury could still find that officers used excessive force when they subsequently tackled Mr. Duarte, broke his leg with a baton, and forced him to walk on his broken leg. ER-58. Second, Mr. Duarte's "conviction" might be based on pushing Defendant Gandy (though Mr. Duarte testified that he did not do so). *See* ER-40; ER-48. But a jury could still find that Defendant Hachler used excessive force by later breaking Mr. Duarte's leg and forcing him to walk on it. ER-58. Third, the "conviction" might be based on Mr. Duarte's failure to put his hands behind his back in response to Defendant Gandy's order to do so (though Mr. Duarte maintains that it was clear his hands were trapped beneath his body such that he *could not* obey the command). ER-45; ER-55. But a jury could still find that Defendant Hachler used excessive force in breaking Mr. Duarte's leg with a baton and forcing him to walk on it. ER-58.

Indeed, under just about *any* version of events that the jury could find, it would be difficult to conclude that a § 148(a)(1) conviction "was based on" the same "action," *see Hooper*, 629 F.3d at 1129, 1134, as the most egregious use of excessive force, Defendant Hachler beating Mr. Duarte's leg until he broke the bone. It's hard to see how Mr. Duarte could have "willfully resist[ed], delay[ed], or obstruct[ed]" any "duty" of Defendant Hachler's "office," *see* Cal. Penal Code § 148(a)(1), when Defendant Hachler was battering his leg with a wooden baton as Mr. Duarte yelled in pain. And Defendants haven't supplied any such version of events, let alone shown it would be *only* possible version of events.

3. The district court claimed to find otherwise because the "underlying lawfulness" of a police officer's actions "is an essential element of the offense of resisting or obstructing a peace officer under § 148" and "the use of excessive force by a police officer is not considered within the lawful purview of his or her duties."[8] ER-13. That's true, as

[8] The district court actually suggested that "the underlying lawfulness of an *arrest*" is an "essential element" of resisting a peace officer under § 148, but that's not right. A violation of § 148(a)(1) can occur well prior to any arrest. *See, e.g.*, *Smith*, 394 F.3d at 696-97 (holding that a § 148(a)(1) conviction could be based on refusing to obey officer commands to take hands out of pockets).

far as it goes. But as this Court has repeatedly held, "[i]t is sufficient for a valid conviction under § 148(a)(1) that *at some time* during a continuous transaction an individual resisted, delayed, or obstructed an officer when the officer was acting lawfully." *Hooper*, 629 F.3d at 1132 (emphasis added). "It does not matter that the officer might also, at some other time during that same continuous transaction, have acted unlawfully." *Id.* So here, a jury could find, for instance, that Officer Moya's commands to disperse were lawful but that tackling Mr. Duarte and breaking his leg, which took place "at some other time," were unlawful.

The district court also seemed to believe that Mr. Duarte's claim of excessive force necessarily implied the invalidity of any § 148(a)(1) conviction because Mr. Duarte was not subjected to excessive force *after* he was handcuffed. ER-16–17. But such a rule would be directly contrary to this Court's opinion in *Smith v. City of Hemet*. In that case, the dissent argued that the plaintiff's § 1983 excessive force suit was barred by *Heck* because "the allegedly excessive force was employed *while* [plaintiff] was being arrested," as opposed to "after the arrest was made." 394 F.3d at 707-08 (Silverman, J., dissenting). The majority specifically rejected that argument: *Heck* did not bar a finding that the officers' use of pepper spray

and a canine bite were excessive force, even though the plaintiff was decidedly not restrained (indeed, he was attempting to reenter the house) when the officers deployed that force. *Id.* at 699.

Similarly, *Smith* forecloses the district court's conclusion that Defendants can invoke the *Heck* bar to dismiss Mr. Duarte's excessive-force claim if Mr. Duarte struggled while on the ground under Defendant Gandy. As an initial matter, such a supposition was inappropriate on summary judgment: Mr. Duarte testified that he was pinned to the ground and was not resisting, so the district court's finding to the contrary runs afoul of the summary-judgment standard. *Compare* ER-57–58 *with* ER-16–17.

But even if Mr. Duarte *were* struggling throughout, *Smith* makes clear that wouldn't matter. In *Smith*, the plaintiff resisted throughout his interaction with officers. 394 F.3d at 703-04. Still, this Court held that a jury could find "the totality of force used," including "four blasts of pepper spray" when plaintiff refused to obey an order to put his hands on his head and "slamming [plaintiff] down onto the porch" when he tried to reenter his residence, to be excessive force. *Id.* at 694, 703-04. Indeed, this Court acknowledged that the plaintiff's § 148(a)(1) conviction could

have been based on precisely the plaintiff's conduct that occurred while he was struggling with the officers. *Id.* at 697. Yet because the § 148(a)(1) conviction *could* have been based on conduct that occurred prior to any of those uses of force, success on the plaintiff's § 1983 claim would not "necessarily imply" the invalidity of any conviction.

So, too, here: Perhaps Mr. Duarte's "conviction" was somehow based on conduct that occurred as Defendant Hachler was breaking his leg, but it also could have been based on conduct that occurred prior to being beaten with a baton (for instance, allegedly disobeying Defendant Gandy's command to show his hands) or even prior to *any* of the officers' uses of force (for instance, allegedly disobeying Officer Moya's command or allegedly pushing Defendant Gandy).

Even if there was a "conviction or sentence" in this case, and even if there was no "favorable termination," then, Mr. Duarte's excessive-force claim should be allowed to proceed because it would not necessarily imply the invalidity of his supposed conviction.

D. Two Features Of Mr. Duarte's Criminal Proceedings Make *Heck* Inapposite Here.

Heck should not bar Mr. Duarte's claims because two features of Mr. Duarte's criminal proceedings make clear that *Heck* is inapposite.

1. First, Mr. Duarte's "plea in abeyance" was a no-contest, or nolo contendere, plea. ER-75. Recall that *Heck* only bars a § 1983 claim when success on that claim would "necessarily imply" the invalidity of a conviction—that is, where a fact that a plaintiff must prove to succeed on his § 1983 claim is inconsistent with a fact that underlies his conviction. *Supra*, §I.C. Even assuming there was a conviction in this case, *but see supra*, §I.A-I.B, that conviction was obtained via a "no-contest" or "nolo contendere" plea to a misdemeanor. ER-74. As a result, there *were* no facts underlying the conviction—the State court didn't need to find any, and Mr. Duarte didn't need to admit any.

a. Under California law, a State court need not confirm any factual basis for a plea to a misdemeanor. *See In re Gross*, 659 P.2d 1137, 1141 (Cal. 1983) (finding no requirement, "statutory or constitutional," that a court "must satisfy itself that there is a factual basis for the plea" to a misdemeanor); The Rutter Group, *California Criminal Procedure* § 14:18 (2021).

In most cases, of course, such a plea will nonetheless rest on some factual basis because a criminal defendant who pleads guilty will admit guilt. But not when the plea is a no-contest plea to a misdemeanor. In

such cases, "the defendant does not confess or acknowledge the charge against him, as upon a plea of guilty"; instead, such a plea "amounts only to a declaration by the defendant that he will not contend." *Caminetti v. Imperial Mut. Life Ins. Co.*, 139 P.2d 681, 689 (Cal. Ct. App. 1943); *see Cty. of Los Angeles v. Civil Serv. Comm'n*, 46 Cal. Rptr. 2d 256, 261-62 (Ct. App. 1995) ("[W]hen the conviction is based on a nolo contendere plea, its reliability as an indicator of actual guilt is substantially reduced, both because of the defendant's reservations about admitting guilt for all purposes and because the willingness of the district attorney to agree to and the court to approve the plea tends to indicate weakness in the available proof of guilt."). A no-contest plea to a misdemeanor thus involves no finding of guilt by any court and no admission of guilt by the defendant.

As a result, a nolo contendere plea to a misdemeanor "may not be used against the defendant as an admission in any civil suit based upon or growing out of the act upon which the criminal prosecution is based." Cal. Penal Code § 1016(3). Indeed, California's statutory scheme specifically contemplates that a criminal defendant convicted via no-contest plea might prove facts inconsistent with his guilt in a subsequent civil

suit without undermining his conviction. *See In re Alonzo J.*, 320 P.3d 1127, 1131-32 (Cal. 2014); *Cty. of Los Angeles*, 46 Cal. Rptr. 2d at 261-65. The plea document that Mr. Duarte and the prosecutor both signed (the one that was held in abeyance) confirmed that understanding: It explained that "a plea of no contest (nolo contendere)…cannot be used against me in a civil lawsuit." ER-75.

b. Success on a § 1983 claim thus ordinarily will not "necessarily imply" the invalidity of a California misdemeanor conviction obtained through a no-contest plea. Even if success on a § 1983 claim conclusively demonstrates that the plaintiff did not commit the misdemeanor to which he pled no-contest, it wouldn't matter; a misdemeanor plea with no factual basis is still a valid misdemeanor plea, and a no-contest plea isn't undermined by a showing that the criminal defendant was not guilty because the criminal defendant did not admit guilt in the first place. *Supra*, 38-39. That's why California specifically allows civil suits to reach an outcome inconsistent with the guilt of a defendant convicted via a no-contest plea to a misdemeanor: Such a result doesn't undermine the conviction. *See In re Alonzo J.*, 320 P.3d at 1131-32.

Even assuming Mr. Duarte had been convicted of a misdemeanor by a no-contest plea, then, that conviction could not be undermined by success in this § 1983 suit. *Heck* thus should not apply to Mr. Duarte's case.[9]

2. *Heck* should not apply here for yet another reason specific to Mr. Duarte's criminal proceedings: He never had an opportunity to file a federal habeas petition.

a. This Court has adopted the view expressed by five justices in *Spencer v. Kenma*, 523 U.S. 1 (1998), that *Heck* only applies when a plaintiff is using a § 1983 suit to evade the strictures of the federal habeas statute. *Nonnette v. Small*, 316 F.3d 872, 876-78 (9th Cir. 2002). In *Spencer*, four justices who joined in a concurrence authored by Justice Souter, plus Justice Stevens in dissent, explained that *Heck*'s requirement was a "simple way to avoid collisions at the intersections of habeas and § 1983"; if a prisoner does not have access to federal habeas, then the *Heck* bar should not apply. 523 U.S. at 20-21 (Souter, J., concurring); *see id.* at 25

[9] This Court has not squarely addressed the question whether *Heck* applies where a conviction is obtained through a nolo contendere or no-contest plea. *See Ove v. Gwinn*, 264 F.3d 817, 823 n.4 (9th Cir. 2001) (assuming, without deciding, that *Heck* applies to convictions obtained via no-contest plea).

n.8 (Stevens, J., dissenting) ("Given the Court's holding that petitioner does not have a remedy under the habeas statute, it is perfectly clear, as Justice Souter explains, that he may bring an action under 42 U.S.C. § 1983."). This Court has thus held that *Heck* "was intended to prevent a person in custody from using § 1983 to circumvent the more stringent requirements for habeas corpus." *Huftile v. Miccio-Fonseca*, 410 F.3d 1136, 1139 (9th Cir. 2005).

In this case, Mr. Duarte is not using his § 1983 suit to "circumvent" the federal habeas statute, because no one disputes that Mr. Duarte had no access to the federal habeas statute to begin with. The federal habeas statute applies only to "a person in custody pursuant to the judgment of a State court." 28 U.S.C. § 2254. It's at least debatable whether performing ten hours of community service (at any non-profit of his choice) meant that Mr. Duarte was "in custody" for purposes of the habeas statute. *See id.* And there's no dispute that any custody wasn't "pursuant to the judgment of a State court": As explained *supra*, 16-17, there was no State-court judgment here requiring the community service. *Id.*; *see Stow v. Murashige*, 389 F.3d 880, 887-88 (9th Cir. 2004).

b. To be sure, this Court has held that a plaintiff who cannot rely on the federal habeas statute may nonetheless be barred by *Heck* if he either (1) had a "practical opportunity to challenge [his] conviction or sentence" via federal habeas and chose not to do so or (2) forfeited an opportunity to challenge the sentence or conviction in State court. *Martin v. City of Boise*, 920 F.3d 584, 613 (9th Cir. 2019). Neither applies here. Mr. Duarte never had "a practical opportunity" to access federal habeas because there was a never a "judgment of a State court." *Supra*, 16-17. He could not have sought review in a State court on direct appeal because a purported misdemeanant can only directly appeal from a "final judgment of conviction." Cal. Penal Code § 1466(b)(1); *see* Cal. R. Ct. 8.308 ("A notice of appeal filed before the judgment is rendered . . . is premature."). And Mr. Duarte did not forfeit an opportunity to seek post-conviction relief in State court because California's habeas statute applies only to persons "unlawfully imprisoned or restrained of [their] liberty." Cal. Penal Code § 1473(a).[10]

[10] This Circuit's requirement that *Heck* might bar a plaintiff who forfeited the opportunity to seek relief in State court is arguably inconsistent with the five-justice view in *Spencer*. If the goal of *Heck* is to avoid a conflict between § 1983 and the *federal* habeas statute, it shouldn't matter

c. Again, this Court's sister circuits have reached similar conclusions when considering agreements analogous to Mr. Duarte's plea in abeyance. The Eleventh Circuit explained that "*Heck* has no application" to the claim of a plaintiff who participated in a pretrial intervention program because plaintiff "was never in custody at all, and the remedy of habeas corpus is not currently available to him." *McClish*, 483 F.3d at 1252 n.19. And the Sixth Circuit has similarly found that the *Heck* bar did not apply to a plaintiff who entered into a pretrial diversion agreement because "§ 1983 claimants who were not eligible for habeas relief" are not barred by *Heck*. *S.E.*, 544 F.3d at 639.

In short, even if Defendants had proven the elements necessary to invoke *Heck*, this Court should not apply the *Heck* bar here. Mr. Duarte's no-contest plea and the fact that he never had recourse to federal habeas render *Heck* inapposite.

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whether a prisoner pursued *State* remedies. For that reason, other circuits that adopt the view of the five justices in *Spencer* require diligence in pursuing federal habeas relief but do not ask whether a plaintiff pursued State remedies. *See, e.g.*, *Morris v. Noe*, 672 F.3d 1185, 1194 n.2 (10th Cir. 2012); *Wilson v. Johnson*, 535 F.3d 262, 268 (4th Cir. 2008); *Powers v. Hamilton Cty. Pub. Def. Comm'n*, 501 F.3d 592, 601 (6th Cir. 2007); *Huang v. Johnson*, 251 F.3d 65, 74-75 (2d Cir. 2001).

One final note is in order. If there is ambiguity as to whether *Heck* applies, Mr. Duarte's claims should not be barred. It was Defendants' burden to show that *Heck* bars Mr. Duarte's claims. *Washington v. Los Angeles Cty. Sheriff's Dep't*, 833 F.3d 1048, 1056 & n.5 (9th Cir. 2016). And they have not and cannot show that it does. The *Heck* requirement is mentioned nowhere in the text of 42 U.S.C. § 1983; that statute says nothing about conflicting judgments or convictions or sentences. Instead, the *Heck* requirement developed as a function of the Supreme Court's belief that a rule against civil tort actions being used to challenge the validity of outstanding criminal judgments was sufficiently "hoary" that § 1983 should be assumed to have been passed against that backdrop. *Heck*, 512 U.S. at 486-87. But arrangements like Mr. Duarte's were "unknown at common law in 1871." *See DeLeon v. City of Corpus Christi*, 488 F.3d 649, 655 (5th Cir. 2007). No "hoary" backdrop in this case justifies reading *Heck*'s requirement into the plain text of the statute.

Even if there's debate about whether Mr. Duarte's plea in abeyance is a conviction (though charges against him were dismissed), whether it amounts to a favorable termination (in spite of this Court's rule that a vacatur and dismissal suffice), or whether a win in this litigation would

"necessarily imply" a different sequence of events than that the conviction rested on (even though the plea agreement is entirely blank as to what facts would support any purported conviction), then, this Court must *still* reverse the district court. Defendants simply have not met their burden of proving that the drafters of §1983 would have been so concerned to protect the validity of a "plea in abeyance"—a concept that did not exist in the nineteenth century—that this Court should import an atextual bar into the statute that would forbid Mr. Duarte's suit.

II. The District Court Erred In Dismissing Mr. Duarte's Claims Against The City of Stockton And The Stockton Police Department.

It is black-letter law that cities are "persons" within the meaning of 42 U.S.C. § 1983. *Monell v. Dep't of Soc. Servs.*, 436 U.S. 658, 662-63 (1978). It is equally black-letter law that California's city police departments are each "persons" within the meaning of § 1983. *Karim-Panahi v. Los Angeles Police Dep't*, 839 F.2d 621, 624 n.2 (9th Cir 1988). Indeed, the pages of the U.S. Reports and Federal Reporters are replete with cases against cities and police departments.[11]

[11] *See, e.g.*, City of St. Louis *v. Praprotnik*, 485 U.S. 112 (1988); *Owen v.* City of Indep., Mo., 445 U.S. 622 (1980); *Saved Magazine v.* Spokane Police Dep't, 19 F.4th 1193 (9th Cir. 2021); *Silva v.* San Pablo Police Dep't,

The district court nonetheless found that the City of Stockton and the Stockton Police Department were *not* "persons" within the meaning of § 1983 and thus dismissed Mr. Duarte's claims against the two entities. The district court's sole basis for disregarding Supreme Court precedent and published cases from this Court was a concurring opinion in *United States v. Kama*, 394 F.3d 1236 (9th Cir. 2005)—a concurrence that mentioned 42 U.S.C. § 1983 only in dicta and that came from a case about a different statute, the Controlled Substances Act. ER-67–68 (discussing *Kama*, 394 F.3d at 1240 (Ferguson, J., concurring)). Needless to say, a concurrence—let alone dicta in a concurrence about an entirely separate statute—does not overrule binding precedent.

In any event, the concurrence was wrong. In support of its contention that "municipal police departments and bureaus are generally not considered 'persons' within the meaning of 42 U.S.C. § 1983," the concurrence cited to *Hervey v. Estes*, 65 F.3d 784 (9th Cir. 1995). Yet *Hervey* only confirms that the City of Stockton is a proper defendant: "It is beyond dispute that a local governmental unit or municipality can be sued

805 F. App'x 482, 484 (9th Cir. 2020); *Byrd v. Phoenix Police Dep't*, 885 F.3d 639 (9th Cir. 2018).

as a 'person' under section 1983." *Id.* at 791. Nor did *Hervey* call into question this Court's decades-old conclusion that California's police departments are separately suable as "persons" under § 1983. *See Karim-Panahi*, 839 F.2d 621 at n.2. *Hervey* was about *Washington* law, not California law. 65 F.3d at 791-92. And even under Washington law, *Hervey* confirmed that ordinary police departments—in that case, the Tacoma Police Department, the Sumner Police Department, and the Pierce County Sheriff's Office—may be sued under § 1983. *Id.*[12]

At the very least, the Supreme Court's decision in *Monell* puts beyond dispute that the City of Stockton should not have been dismissed. 436 U.S. at 662-63. And the district court could not dismiss the Stockton Police Department "without analysis of state law," which it did not perform. *Silva v. San Pablo Police Dep't*, 805 F. App'x 482, 484 (9th Cir. 2020).

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[12] The other circuit-court case cited by the *Kama* concurrence dealt not with the question Defendants raised below (whether a police department is a "person" within the meaning of § 1983) but with the separate affirmative defense of capacity for suit under Fed. R. Civ. P. 17(b), which Defendants have not raised. *Dean v. Barber*, 951 F.2d 1210, 1214 & n.5 (11th Cir. 1992) ("The question here is not whether the [Sheriff's department defendant] is a 'person' for the purposes of liability under *Monell* and section 1983, but whether the [defendant] is a legal entity subject to suit.").

The district court's conclusion was, in short, indefensible. This Court must reverse the dismissal of claims against the City of Stockton and the Stockton Police Department.

CONCLUSION

For the aforementioned reasons, this Court should reverse the district court's decision.

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Respectfully submitted,

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STATEMENT OF RELATED CASES

The undersigned attorney, Easha Anand, is unaware of any related cases currently pending before this Court.

Respectfully submitted,

/s/ Easha Anand
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CERTIFICATE OF COMPLIANCE

Pursuant to Fed. R. App. P. 32(a)(7)(C), I certify that:

This brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B) because this brief contains 10,290 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii).

This brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6) because this brief has been prepared in a proportionately spaced typeface using Microsoft Word Century Schoolbook 14-point font.

Respectfully submitted,

/s/ Easha Anand
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CERTIFICATE OF SERVICE

I hereby certify that on April 12, 2022, I electronically filed the foregoing *Appellant's Opening Brief* with the Clerk of the Court for the United States Court of Appeals for the Ninth Circuit by using the appellate CM/ECF system.

Participants in the case who are registered CM/ECF users will be served by the appellate CM/ECF system.

Respectfully submitted,

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